STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Apple Canyon Utility Company	)	
	)	
Lake Wildwood Utilities Corp.	)	
	)	
	)	Docket Nos. 12-0603/12-0604 (Cons.)
Proposed general rate increase for water service.	)	
	)	
	)	

REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission" or "ICC") Rules of Practice (83 Ill. Adm. Code 200.830) and the schedule set by the Administrative Law Judge ("ALJ"), respectfully submits its Reply Brief on Exceptions.

Introduction

On October 1, 2012, Apple Canyon Utility Company ("AC" or "Apple Canyon") and Lake Wildwood Utilities Corp. ("LW" or "Lake Wildwood") (collectively, the "Companies" or "Utilities" or "UI") filed separate 285 Filings and separate direct testimony of Mr. Dimitry Neyzelman, which proposed general rate increases for the respective water services. On November 8, 2012, the Commission suspended both proposed tariffs to and including January 28, 2013. On November 13, 2012, Lake Wildwood Association, Inc. ("LWA") filed a petition to intervene in Docket No. 12-0604. On December 3, 2012, Docket No. 12-0603 and Docket No. 12-0604 were

consolidated.

Initial Briefs were filed on May 16, 2013 by the People of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of the State of Illinois (the "AG"); the Lake Wildwood Association and Apple Canyon Lake Property Owners' Association (LWA/ACLPOA); Staff; and Apple Canyon and Lake Wildwood. Staff, Apple Canyon and Lake Wildwood, LWA/ACLPOA, and the AG filed Reply Briefs on May 30, 2013. On June 27, 2013, the ALJ issued her Proposed Order ("PO"). Staff, the AG, LWA/ACLPOA, and Apple Canyon and Lake Wildwood filed their respective Briefs on Exceptions ("BOE") on July 12, 2013.

Discussion

Staff responds to the exceptions made by the other parties in their BOEs, and although Staff may not address each exception, Staff stands by its previous arguments and exceptions.

I. RATE BASE – ADJUSTMENTS

Cash Working Capital – Invested Capital Tax

The AG argues that the Invested Capital Tax ("ICT") should be removed from the Cash Working Capital ("CWC") calculation because "the Companies failed to support the ICT expense as a reasonable test year expense in this case." AG BOE at 7. If the Companies had failed to support the ICT as a "reasonable test year expense," the ICT would be a reduction to both operating expenses and to rate base through the CWC calculation. Since the AG does not claim the ICT should be removed from operating expenses, this argument falls short. *See* AG IB at 7. The AG does not take issue with ICT being included as an operating expense. However, the AG does not offer any

argument as to how this expense does not affect cash flow, which is the purpose of the CWC calculation. Therefore, the AG's proposal should be rejected.

Tank Painting

The AG argues that the 10-year amortization for tank painting should be disallowed from the revenue requirement in this case, claiming that the tank painting comes 2 years earlier than it should. AG BOE at 3. While the PO indicates that the Company's witness testified that *generally* tank painting is required every 10 years, there is nothing in the record to indicate that is the same amount of time the 2005 paint job was expected to last. What is in the record is that the estimated life of the paint project proposed in this case is approximately 10 years. AG Cross Exhibit 5. In addition, if the tank painting proposed by the utility in this case is not allowed, then the tank painting from 2005 would apparently still be allowed as if it had a remaining life, which it does not. In that case, the amount to be recovered for tank painting would not be zero as the AG recommends, but would be based on the remaining life of the 2005 paint project with a total cost of $74,081.75 to be recovered for any remaining amortization. *Id.* Although the utility clearly has the over-all burden of proof, in light of the evidence the company adduced on the estimated life of the tank painting, unless the AG can point to evidence in the record that the 2005 paint project has a useful life remaining, the PO's conclusion regarding tank painting should stand.

Leak and Boundary Surveys

Staff will not repeat the arguments made during the case and accepted in the PO concerning the costs of leak and boundary surveys. However, an argument presented for the first time in the BOE by UI must be addressed. UI complains that it would only

be allowed to recover survey costs if they are performed in the test year and would then likely be disallowed as non-recurring costs. UI BOE at 3. Staff explained appropriate accounting for survey costs (Staff Ex. 8.0 at 4-5) which would not automatically result in non-recovery as the Companies protest. That argument notwithstanding, and as the PO correctly found for the boundary surveys, no recovery from ratepayers is appropriate. PO at 13.

Additional Pro Forma Plant Additions

The Utilities argue that the Proposed Order should have approved the pro forma adjustments for Well #1 for Apple Canyon and the Lake Wildwood water treatment facilities. AC/LW BOE at 4. As rationale for this position, the Utilities reiterate their previous argument that "Part 287.40 does not apply to utilities that serve fewer than 35,000 customers." UI BOE at 4; *see* PO at 19. The Proposed Order stated that "[t]he Commission finds that the Utilities have misread Part 287 of the Commission's rules" and "[t]he Part 285 exemption for small utilities is not included in Part 287." PO at 19. Staff agrees with the Proposed Order; Part 287 is clear that the "Part shall apply to all public utilities as defined in Section 3-105 of the Public Utilities Act . . . and to those telecommunications carriers as defined in Section 13-202 of the Act and 83 Ill. Adm. Code 285." 83 Ill. Admin. Code § 287.10.

As the ALJ points out, and is clear from the plain reading of the Part:

> Part 287.10 states that Part 287 applies to all utilities as defined in Section 3-105 of the PUA – Lake Wildwood and Apple Canyon fall under this definition. Part 287 also applies to telecommunication carriers as defined in Section 13-202 of the PUA that are subject to the requirements of Section 9-210 and Part 285. The Part 285 exemption for small utilities is not included in Part 287.

PO at 19. Staff agrees. Part 287 is clear that it applies in two types of entities: (1) all public utilities as defined in Section 3-105 of the PUA; and (2) those telecommunication carriers as defined in Section 13-202 of the Act and 83 Ill. Admin. Code 285. The word "all" modifies "public utilities as defined in Section 3-105 of the PUA," and indicates the Part applies to all entities identified as "public utilities." Both Apple Canyon and Lake Wildwood fall within the definition of public utilities in that Section. The word "those" modifies "telecommunications carriers" and indicates the Part applies to only a subsection of telecommunications carriers. The subset of telecommunications carriers to which the Part applies is specified with the dependent clause "as defined in Section 13-202 and 83 Ill. Admin. Code 285.

Utilities' argument that Part 287 does not apply is in error.

II. OPERATING REVENUES AND EXPENSES -- ADJUSTMENTS

Appeals Costs

On pages 5 through 6 of its Brief on Exceptions, the Companies provide replacement language and argument in support of their exception to the PO conclusion to disallow rate case appeals costs. The Commission should reject the replacement language and the arguments set forth by the Companies, and adopt the PO conclusion to disallow the appeals costs in question.

The Companies' replacement language should be rejected

The replacement language recommended by the Companies includes language that does not relate to this proceeding in any manner. The replacement language states "[i]n those cases, the Commission further decided the fact that the appeals have been unsuccessful does not make the cost of bringing such appeal unreasonable…" UI

at 6. At no point in testimony or briefs did Staff argue that the costs of appeals should be disallowed because the appeals were unsuccessful. Staff's position was that (1) the costs were above and beyond what was approved as rate case expense by the Commission in the 2009 rate cases, (2) the costs do not represent normal costs of doing business that are expected to recur during the periods in which rates set in this proceeding will be in effect, and that (3) ratepayers should not be forced to compensate the Companies for costs of actions they undertook as a result of their dissatisfaction with the Commission's Order. Staff IB at 14. As such, the suggested replacement language bears no relation to the current proceeding, and should be rejected.

The replacement language recommended by the Companies includes additional language that further misrepresents the record. The replacement language states "[a]ccordingly, the Commission adopts Staff's alternative proposal which would allow recovery of the appeal costs deferred and amortized over the same five-year amortization period that the Companies and Staff recommended for the rate case expenses of the current proceeding." UI BOE at 6. At no point in testimony or briefs did Staff propose allowing recovery of all appeal costs. Staff's alternative proposal was to allow 50% of appropriately supported appeals costs, deferred and amortized over a five-year amortization period. Staff IB at 17. This alternative proposal was set forth in acknowledgement that one *could* conceivably conclude that two of the four appeals issues were not initiated by the Companies and costs incurred related to defending the Companies on those issues *could* be recoverable. If the Commission adopts Staff's alternative proposal, which it should not, the alternative proposal considered should be that explained in Staff's testimony and briefs. *Id.* at 17-18.

The Companies' argument should be rejected

In support of their exception to the PO conclusion on appeals costs, the Companies claim that the *Citizens Utilities* (ICC Docket No. 84-0237, March 13, 1985) and *Prestwick Utilities* (ICC Docket No. 81-0828, October 6, 1982) cases are not distinguishable from the current proceeding. The Companies are wrong. Further, the Companies' argument fails to provide any support for this claim.

The Companies' citation to *Citizens Utilities* does not aid its argument because the issue at hand is not the same. In *Citizens Utilities*, the matter of law decided was that the Commission is *not prohibited from considering* as a reasonable operating expense the appellate costs of the last rate case. *Citizens Utilities* at 22. In fact, the *Citizens Utilities* Order cited by the Companies stated, in part:

> In Candlewick the court did not conclude that legal expenses outside of the rate case contest are per se unreasonable operating expenses. Rather, the court simply found that **the extraordinary and non-recurring nature of the expenses constituted a legitimate basis for the Commission to exclude recovery from ratepayers**.

Citizens Utilities at 21 (emphasis added). Here, no party argued that the Commission was prohibited from considering appeals costs. Further, the PO specifically considered whether the appeals costs in question in this proceeding are a reasonable operating expense. After weighing the evidence, the PO correctly determined that the appeals costs should be removed from operating expense. PO at 27-28.

Additionally, the Companies' citation to *Prestwick Utilities* does not aid its argument because, contrary to the Companies' claim, *Prestwick Utilities* is distinguishable from the current proceeding. The appeals costs at issue in *Prestwick*

Utilities were related solely to the utility's defense of an Intervenor's appeal. The *Prestwick Utilities* Order stated, in part:

> However, it appears that **$9,084 of the amount claimed by Respondent with respect to the last rate case was caused by the appeal which was taken by Intervenors from that Order.** The Commission was not able to determine a proper expenditure for that appeal at the time of that Order, and the Commission is of the opinion that the defense of that appeal was an appropriate activity and expense for Respondent.

Prestwick Utilities at 5 (emphasis added). In the current proceeding, however, the appeals costs at issue differ, as they include the costs of the Companies' appeals as well. As such, the facts of the *Prestwick* Utilities case differ from those at issue in the current proceeding, and *Prestwick Utilities* is not authority which requires the Commission allow recovery of 100% of appeals costs.

Invested Capital Tax ("ICT")

The Company argues that an adjustment to increase Apple Canyon's revenue requirement for ICT should be approved by the Commission since "there was no testimony disputing that Apple Canyon will incur this expense." UI BOE at 2. This proposal by UI was not made until the Company's surrebuttal testimony in response to the AG's proposed adjustment for CWC. Staff RB at 3. No parties had opportunity to present testimony disputing the adjustment. The Commission should not consider that proposal, as it was not timely presented in the case for consideration.

Conclusion

WHEREFORE, for all the foregoing reasons, Staff of the Illinois Commerce Commission respectfully requests that the Commission's order in this proceeding reflect all of Staff's recommendations and that they be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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